83 - 1860

Office - Supreme Court, U.S.
FILED
MAY 11 1984
ALEXANDER L. STEVAS,
CLERK

No. ..-..

IN THE

Supreme Court of the United States

October Term, 1983

MARGUERITE M. SHAW,

Petitioner,

vs.

ROBERT D. MITCHELL, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI, TO THE CALIFORNIA STATE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE.

NEWELL JOHN GARDNER,
8383 Wilshire Boulevard,
Suite 1042,
Beverly Hills, Calif. 90211,
(213) 653-5760,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

58pp

Questions Presented.

The original Complaint of Petitioner herein, SHAW, was dismissed by the trial court on May 14, 1981, at an Order to Show Cause re Dismissal for Lack of Prosecution (based upon failure to attend a Mandatory Settlement Conference). Neither Petitioner nor her counsel attended this Order to Show Cause hearing because they had not received any notification from the Court that said hearing had been set, just as they had not been notified that the Mandatory Settlement Conference had been set and they had likewise not attended said conference.

At the time of said Order to Show Cause the only evidence before the trial court that proper notice had been given of the hearing date, time and place, was a "Clerk's Certificate of Mailing." This certificate of mailing, however, evidenced mailing of notice to Petitioner and her counsel at an incorrect address. That is, it showed that the notice had been sent to Petitioner's counsel at an address he had not used nor been doing business at for over a year and ten (10) months. In addition, there was also on file at the time of said Order to Show Cause hearing, a proper "Notice of Change of Address" which notice had been on file with the Court for over fourteen (14) months prior to the clerk sending out the notice of the Order to Show Cause hearing and which evidenced the correct address and which also was the address which had been shown on all other documents which had been filed in the action for the fourteen (14) month period prior to the mailing of said notice of the Order to Show Cause hearing.

On appeal, the Court of Appeal found that the discrepancy between the address set forth in the "Clerk's Certificate of Mailing" and the address set forth, in the record, on the "Notice of Change of Address" and on all subsequent

pleadings only created a "conflict in the evidence" which must necessarily be resolved in favor of the judgment and accordingly found that the admittedly incorrectly addressed "Clerk's Certificate of Mailing" was sufficient to form the basis for the trial court's finding that notice had been given and thus was sufficient to support the order dismissing the Petitioner's Complaint.

As will be more completely shown hereinafter this ruling was made even in the face of prior California appellate court cases which held that when an envelope containing notice is improperly addressed it is as though notice was never mailed by the Court Clerk. And also, in the face of holdings that services by mail must strictly comply with the requirements of Section 1013 of the *California Code of Civil Procedure* in order to be valid and said statute mandates that such service must be sent to an address as last given on any document which the party to whom it is addressed has filed in the cause and served on the party making the service by mail.

The first time petitioner discovered that her complaint had been dismissed at the Order to Show Cause re Dismissal for failure to attend the Mandatory Settlement Conference was at the time she was required to go to trial on the cross-complaint of respondent herein, MITCHELL. Petitioner thereafter elected to directly appeal the judgment entered on the said cross-complaint and the order of dismissal of her complaint on the theory that there was insufficient evidence before the trial court at the time of said OSC hearing upon which to base any finding that proper prior "Notice" had been afforded petitioner.

In view of these facts, the question thus presented to this Court by this Petition for Writ of Certiorari is as follows:

1. GIVEN THE UNQUESTIONED CONSTITUTIONAL, DUE PROCESS OF LAW, RIGHT OF A PARTY TO "NOTICE" AND AN "OPPORTUNITY TO BE HEARD" PRIOR TO BEING DEPRIVED OF LIFE, LIBERTY OR PROPERTY, IS A PARTY DENIED THIS CONSTITUTIONAL RIGHT WHERE A TRIAL COURT HOLDS A HEARING, ON AN ORDER TO SHOW CAUSE RE DISMISSAL FOR FAILURE TO ATTEND A MANDATORY SETTLEMENT CONFERENCE, IN THE ABSENCE OF THE PARTY, AND BASES ITS AUTHORITY TO PROCEED AND DISMISS THE PARTY'S ENTIRE COMPLAINT ON A DETERMINATION THAT SUCH "NOTICE" HAD BEEN GIVEN BY VIRTUE OF A "CLERK'S CERTIFICATE OF MAILING" WHICH SHOWS "MAILING" TO AN ADDRESS WHICH THE COURT FILE/RECORD CLEARLY SHOWS IS AN INCORRECT ADDRESS?

Statement of Parties.

The following persons are the parties to this action:

Petitioner: MARGUERITE M. SHAW

Counsel of Record: NEWELL JOHN GARDNER
Attorney at Law
8383 Wilshire Blvd.
Suite 1042
Beverly Hills, California
90211

Said Petitioner, MARGUERITE M. SHAW was the Plaintiff at the trial court level and also the Cross-defendant in the Cross-complaint which culminated in judgment at the trial court level. In addition she was the Appellant at the Court of Appeal level and the Petitioner at the California State Supreme Court level.

Respondent: ROBERT D. MITCHELL

Counsel of Record: VALENSI & ROSE
1880 Century Park East
Suite 1518
Los Angeles, California
90067

Said Respondent, ROBERT D. MITCHELL, was the Cross-complainant in the Cross-Complaint which culminated in judgment at the trial court level. In addition, he was the Respondent at the Court of Appeal level and at the California State Supreme Court level.

With respect to all other Plaintiffs, Defendants, Cross-complainants, and Cross-defendants at the trial court level, said parties have heretofore either abandoned this action or have been dismissed out of this action.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement of Parties	iv
Opinions Below	2
Jurisdiction	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	5
How the Federal Question Was Raised	7
Reasons for Granting the Writ	15
Conclusion	29

INDEX TO APPENDIX

Exhibit A. Judgment	App. p. 1
Minute Order	2
Notice of Ruling	3
Exhibit B. Opinion of the Court of Appeal of the State of California	4
Exhibit C. Hearing Denied	18
Exhibit D. Full Text of the Particular "Constitutional and Statutory Provisions Involved" in This Matter	19

TABLE OF AUTHORITIES CITED

Cases

Page

Drummey v. State Board of Funeral Directors & Embalmers (1939) 13 Cal.2d 75, 87 P.2d 848 28

Forslund v. Forslund (1964) 255 Cal.App.2d 476, 37 Cal.Rptr. 489 28

Hurley v. Lake County (1931) 113 Cal.App. 291, 298 P. 123 12

Lambert, In re (1901) 134 Cal. 626, 66 P. 851 28

Litchfield v. Marin County (1955) 130 Cal.App.2d 806, 280 P.2d 117 28

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 28

Pennoyer v. Neff (1878) 95 U.S. 714, 24 L.Ed. 565 27

Reeves v. City of Burbank (1979) 94 Cal.App.3d 770 20

Stubblefield, et ux v. Long, et al. (1932) 125 Cal.App. 329, 13 P.2d 862 12

Triumph Precision Products, Inc. v. Insurance Company of North America (1979) 91 Cal.App.3d 362, 154 Cal.Rptr. 120 ..... 14, 20, 22, 27, 28, 29, 30

Valley Vista Land Co. v. Nipomo Water & Sewer Co. (1967) 63 Cal.Rptr. 78 ..... 13, 14, 20, 27, 28, 29, 30

Wilson v. Sunshine Meat & Liquor Co. (1983) 34 Cal.3d 554 ..... 8, 12, 15

Constitution

United States Constitution, Fifth Amendment 3, 4

United States Constitution, Fourteenth Amendment 3, 4

Page

Statutes

California Code of Civil Procedure, Sec. 473 10
California Code of Civil Procedure, Sec. 1013 ..... ii, 4, 21, 22, 28, 29, 30
California Evidence Code, Sec. 641 ..... 4, 23
United States Code Annotated, Title 28, Sec. 1257(3) 3, 4

No. ..-..

IN THE

Supreme Court of the United States

October Term, 1983

MARGUERITE M. SHAW,

Petitioner,

vs.

ROBERT D. MITCHELL, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI, TO THE CALIFORNIA STATE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE.

Petitioner, MARGUERITE M. SHAW, (hereinafter referred to as SHAW) prays that a Writ of Certiorari issue to review the decision, on appeal, of the California State Court of Appeal, Second Appellate District, Division One, which decision affirmed the judgment of the trial court, the Superior Court of Los Angeles County, State of California, dismissing the Complaint of SHAW against Respondent herein, ROBERT D. MITCHELL, *et al.*, (hereinafter referred to as MITCHELL) and entering judgment in favor of MITCHELL and against SHAW on the cross-complaint of MITCHELL, and thereby denying SHAW her Constitutional right to notice and a hearing prior to her suit against MITCHELL being dismissed and prior to her having to proceed to trial on MITCHELL's cross-complaint. Said

Petitioner, SHAW, was denied her Constitutional right to Due Process of Law which guarantees her the right to notice and an opportunity to be heard before being deprived of her life, liberty or property, and the decision of said Court of Appeal should be reversed and the matter sent back to the trial court for further proceedings in conformance with the review requested herein and its anticipated determinations.

A Petition for Hearing has been previously filed in this matter with the California Supreme Court. This Petition for Hearing was summarily denied by postcard notification from said California Supreme Court on February 15, 1984.

Opinions Below.

The Judgment which was entered in this matter on July 31, 1981, and the order of May 14, 1981, dismissing the Complaint of SHAW for lack of prosecution (failure to attend mandatory settlement conference), of the Superior Court of Los Angeles County, State of California, are attached hereto as Exhibit "A" in the appendix attached hereto.

The opinion of the California State Court of Appeal, Second Appellate District, Division One, State of California, which was filed on November 18, 1983, and review of which is being requested by this Petition, is attached hereto as Exhibit "B" in the appendix attached hereto. Said opinion was issued "Not to be Published" and it has thus not been published nor reported.

The order of the California Supreme Court denying the Petition of SHAW for a Hearing in said Court was summary in nature, was entered on February 15, 1984, and is evidenced by a "postcard" denial a copy of which is attached hereto as Exhibit "C" in the appendix attached hereto.

The judgment, opinion, and order of denial of a hearing, are clear denials by said respective courts of the Due Process of Law requirements of the Constitution of the United States

and the attendant rights of Petitioner, SHAW, to notice and an opportunity to be heard prior to her being deprived of life, liberty or property. Accordingly, this Petition for Writ of Certiorari.

Jurisdiction.

The Petitioner herein is requesting that this Court review the decision of the California State Court of Appeal, Second Appellate District, Division One, which was filed on November 18, 1983. However, prior to the filing of this Petition for Writ of Certiorari, Petitioner still had a state court remedy by way of a Petition for Hearing in the California State Supreme Court. Petitioner filed said Petition for Hearing with the California State Supreme Court on December 28, 1983.

The State Court remedies were accordingly exhausted by the Petitioner herein when said Petition for Hearing with the California Supreme Court was denied by order of said California Supreme Court on February 15, 1984. This Petition for Writ of Certiorari was filed less than ninety (90) days from the date aforesaid.

This Court has jurisdiction to hear this Petition for Writ of Certiorari under 28 U.S.C.A. Sec. 1257, sub. (3). A title, right, privilege or immunity was claimed under the Constitution or statutes of the United States, in that at all stages of the proceedings below the Petitioner herein, SHAW, has consistently claimed and raised the point that she has been denied her Constitutional right to Due Process of Law as guaranteed to her by the 5th and 14th Amendments to the United States Constitution, and in particular her attendant right to notice and an opportunity to be heard prior to her being deprived of life, liberty or property. A review of the denials to Petitioner of this Constitutional right is herein

sought, and this claim of right and privilege forms the basis for the jurisdiction of this Court under said 28 U.S.C.A. Sec. 1257, sub. (3).

Constitutional and Statutory Provisions Involved.

A determination of this matter involves the following provisions of the United States Constitution and Statutes of the State of California:

The Fifth Amendment of the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment of the Constitution of the United States provides in pertinent part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

In addition, *California Evidence Code*, Section 641 states as follows:

> "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."

Finally, *California Code of Civil Procedure*, Section 1013 provides in pertinent part as follows:

> "(a) In case of service by mail, the notice or other paper must be deposited in a post office, mailbox, sub-post office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage prepaid, addressed to the person on whom it is to be served at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail . . ."

See the Appendix attached hereto for the full text of the particular "Constitutional and Statutory Provisions Involved" in this matter (APPENDIX - EXHIBIT "D").

Statement of the Case.

This case deals with a fact situation by which the Petitioner herein has been denied her fundamental Constitutional right to DUE PROCESS OF LAW and the right to NOTICE and an OPPORTUNITY TO BE HEARD before she being deprived of life, liberty or property.

On November 5, 1976, Petitioner herein, SHAW, filed a Complaint in the Los Angeles Superior Court against the respondent herein, MITCHELL, alleging fraud, conversion and breach of contract. This action arose out of a joint venture between the parties. Pursuant to the goals of this joint venture the Bank of America made a loan to the corporation in which Petitioner was a principal and this loan was personally guaranteed by Petitioner and four (4) other individuals. This loan was subsequently not paid by the corporation and stock which had been pledged by one of the guarantors, respondent herein, ROBERT D. MITCHELL, was subsequently sold by the bank and the proceeds applied to the monies owing to the bank by reason of the default.

On June 6, 1977, MITCHELL filed a cross-complaint against the Petitioner herein alleging various causes of action, including one for contribution and reimbursement by a surety based on his alleged payment of the corporate obligation.

A Mandatory Settlement Conference was held on April 29, 1981, at which neither Petitioner herein nor her counsel appeared, the alleged "Notice" of said conference having been sent by the Court clerk to the wrong address for Petitioner's counsel. Thereafter the court "Noticed" an Order to Show Cause hearing directing Petitioner to show cause as to why her complaint should not be dismissed for failure to attend the said Mandatory Settlement Conference. This

alleged "Notice" was likewise mailed to the same incorrect address and again neither Petitioner nor her counsel appeared. Accordingly, the court dismissed the complaint on its own motion for lack of prosecution (failure to attend the settlement conference).

On the day set for trial, MITCHELL proceeded on the tenth cause of action of the cross-complaint for contribution reimbursement by surety and co-guarantor. Again, neither petitioner/plaintiff nor her counsel appeared but when the matter was sent to a trial court for a default prove-up the trial judge spotted the error in the "Notices" and telephoned counsel for Petitioner and informed him the matter was in his court for default prove-up. Counsel then appeared and requested a continuance but the same was denied and Petitioner was required to proceed to trial on the said tenth cause of action of the cross-complaint, the dismissal of the complaint having already disposed of any action Petitioner had had against MITCHELL.

After a two (2) day trial the court entered judgment on the cross-complaint in favor of MITCHELL and against SHAW in the principal sum of $38,696.63 together with prejudgment interest thereon from January 6, 1977 in the sum of $14,056.00, plus reasonable attorneys' fees and costs.

An appeal of said judgment and order of dismissal thereafter was made to the Court of Appeal, Second Appellate District, Division One, State of California on August 13, 1981. A decision was rendered on said appeal by said court with an opinion thereon being filed on November 18, 1983. (Exhibit "B" in the attached appendix herein).

At the trial, when requesting the continuance as set forth above, the Petitioner had raised her constitutional right to notice and the same constitutional rights were briefed for

the said Court of Appeal.

After the Court of Appeal affirmed the trial court's judgment and order of dismissal the Petitioner petitioned the California Supreme Court again briefing the constitutional right to notice issue but said Petition for Hearing was denied on February 15, 1984. (Exhibit "C" in the attached appendix herein).

How the Federal Question Was Raised.

Trial Court — The federal question which is the basis for this Petition is the right of the Petitioner to "Notice" and an opportunity to be heard prior to her being deprived of her property. The stage of the proceedings which is most pertinent to the claim of petitioner that this right was denied her is the Order to Show Cause re Dismissal for failure to attend the Mandatory Settlement Conference. It was at this hearing that the trial court ordered that the complaint of petitioner herein be dismissed. It is this dismissal which deprived her of her ability to prosecute her claims against respondent, MITCHELL, and which also necessarily deprived her of being able to present her affirmative claims against MITCHELL at the trial on the cross-complaint.

Neither petitioner nor her counsel appeared at the Order to Show Cause re Dismissal hearing by virtue of the simple fact that neither of them received any notice of where or when the hearing would be held, or even that any such hearing would be held at all. Even putting aside the question of whether or not petitioner or her counsel even had notice of the original Mandatory Settlement Conference, the fact remains that any alleged "notice" which was given by the court clerk as to the said Order to Show Cause re Dismissal was sent to an incorrect address. And, since no appearance was made at said OSC hearing it was impossible for petitioner or her counsel to have raised the question of lack of

notice at the Order to Show Cause re Dismissal hearing itself.

In the opinion of the Court of Appeal (Exhibit "B" to the appendix herein) the Court states, at page 7:

> "Appellant attempts to show an abuse of discretion by claiming here that her counsel did not receive notice of the mandatory settlement conference or the order to show cause hearing as the notices were incorrectly addressed by the clerk.[2] No such excuses or claims were before the trial court at the time of the hearing.[3]"

Footnote 2 referred to therein acknowledges that the requirement of notice is unquestioned, citing *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 565, fn.7.

Obviously, the statement that "No such excuses or claims were before the trial court at the time of the hearing" is a *non sequitur* in that if one doesn't appear one can't present any "excuses or claim". On appeal, petitioner submitted a six-page declaration of her counsel which set forth the facts that the lack of proper notice question was raised at the time counsel for petitioner appeared in the trial court on the day of trial, after having been telephoned by the trial judge, and requested a continuance. This declaration was presented by virtue of the fact that the arguments at this request for continuance had not been transcribed by a reporter. The Court of Appeal, however, in footnote 3 (as referred to in the above quotation from said appellate opinion) the court refused to consider this declaration as not properly being a part of the trial court record on appeal. The Court of Appeal stated in said footnote 3, in pertinent part, at pages 7 and 8 of the said opinion, in view of the record properly before them:

> "3. . . . At no time did plaintiff's counsel present to the trial court any excuse for her failure to appear, and we will not here try the issue of fact whether he did

or did not have notice of these hearings. . . ."

Thus, on first blush, one might say that for purposes of the record which can be properly considered to be before this Court, these statements from the Court of Appeal opinion would seem to indicate that the federal constitutional question of proper notice was not raised in the trial court below. However, this argument still begs the point that it was impossible to have presented these questions at the hearing itself since there was no appearance and the reason for such non-appearance was by virtue of the very fact that the right in question itself precluded the making of any such claims at the hearing itself. Had the petitioner appeared at the hearing in question there would have been no need to raise the point since her very appearance would have indicated that she had indeed gotten actual notice even if it had been improperly mailed. The Court of Appeal seems to recognize this fact since it goes on in its opinion to discuss the remedies available to the petitioner under California law when one is placed in the position of not having been able to present facts showing no "Notice" at the particular hearing in question by virtue of no appearance having been made precisely because of said alleged lack of notice.

At pages 7 and 8 of said Court of Appeal opinion (Exhibit "B" in the appendix herein) the Court states:

> "Plaintiff had a procedural choice — an order of dismissal for want of prosecution is directly appealable or an ejected plaintiff may seek redress through a motion to vacate pursuant to section 473 of the Code of Civil Procedure where, through mistake, inadvertence or excusable neglect, he has failed to make the showing he could have made at the hearing on the motion. (Citing authorities) The court in *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 388-389, describes the advantages of the latter approach: 'Newly revealed

> facts, may demonstrate that the moving party was effectually deprived of a meaningful opportunity to defend against the original motion. These newly revealed circumstances may also persuade the trial court that the dismissal should not have been ordered . . . and the action of the appellate court will be based upon a record not available to the plaintiff had he appealed from the dismissal itself.' Plaintiff chose to appeal directly from the dismissal rather than move to vacate under Code of Civil Procedure, section 473, and by that choice has limited herself to the record she has made with the trial court."

Thus, petitioner would herein submit that under California law, when a party's ability and opportunity to raise the question of a denial of her federal constitutional right to notice has been made impossible by the fact that it was this very opportunity which she did not get notice of, the party has a choice of remedies. The question can be raised by motion to vacate under California Code of Civil Procedure, Section 473 or by direct appeal. Granted, the direct appeal choice of remedies may be more limiting to a party with regards to the quantity of facts available to support the contention. However, the fact that a party elects not to proceed under the CCP 473 motion procedure does not foreclose the federal constitutional issue but rather as the Court of Appeal points out, it only limits the party "to the record she has made with the trial court".

Accordingly, even though the Court of Appeal states in said previously referenced footnote 3 at page 8 of its opinion, "we will not here try the issue of fact whether he did or did not have notice of these hearings" the court nevertheless *does* examine the constitutional contention of lack of notice. But, it does so in terms of whether or not the trial court did have sufficient evidence before it, at the

time of the Order to Show Cause re Dismissal hearing, upon which to make a finding that proper "notice" had been given.

The determination of the Court of Appeal that there *was* sufficient evidence in the court file that was before the trial court at the time its Order to Show Cause re Dismissal was heard and the complaint dismissed, upon which to conclude that "Notice" had been given as admittedly required is the very point which is now before this Court by way of this Petition for Writ of Certiorari.

Accordingly, petitioner would submit that with regards to the raising of the federal constitutional question at the trial court level, the denial of the constitutional right herein asserted also acted so as to preclude petitioner from actually bringing the point to the trial court's attention at the hearing since there was no appearance because she was never notified of the hearing date, time or place. Under state law the alternatives after the hearing were either a motion to vacate or direct appeal. The petitioner herein directly appealed the order of dismissal along with the judgment on the cross-complaint.

State Court of Appeal level — In the "Appellant's Opening Brief" the Petitioner advanced four (4) "Issues on Appeal" (pages 4 and 5, Appellant's Opening Brief). The first and primary issue (Issue #1) raised the federal constitutional question of a lack of "notice" as required by the Due Process of Law requirement of the United States Constitution. Said issue as stated therein was as follows:

> "1. The Complaint of plaintiff/appellant was improperly dismissed by the Court on its own motion for failure of counsel for plaintiff/appellant to have attended the scheduled Mandatory Settlement Conference and the Order to Show Cause hearing which was thereafter set for purposes of showing cause why the

Court should not dismiss the action for lack of prosecution, on its own motion, when neither plaintiff/appellant nor her attorney of record ever received any notice of either hearing."

In thereafter briefing the issue, in the "Discussion" (argument) section of said appellate brief petitioner set forth the due process requirements of notice and an opportunity to be heard along with pertinent case authorities. (Appellant's Opening Brief, page 7). Petitioner set forth the argument that she was entitled to proper notice and that proper notice was denied her in the trial court. The petitioner cited, in particular, the case of *Stubblefield, et ux v. Long, et al.*, (1932) 125 Cal.App. 329, 13 P.2d 862, stating that in said case "it was held that the granting of a motion to dismiss for want of prosecution was reversible error in the absence of proof that plaintiffs had received five (5) days notice of trial (CCP 594)." (Upon the authority of *Hurley v. Lake County* (1931) 113 Cal.App. 291, 298 P. 123) (Page 8, Appellant's Opening Brief).

In addition, the petitioner went on to argue and discuss the ways in which she was denied the notice she was entitled to and the ways in which she was prejudiced by this denial.

In opinion which was thereafter filed by said Court of Appeals (Exhibit "B" to the appendix herein) the court discussed the contentions of petitioner on the issue of notice, after first treating the basic requirement of "Notice" as clearly being "unquestioned" (page 7, footnote 2, citing *Wilson v. Sunshine Meat & Liquor Co., infra*). Further consideration as to how the said Court of Appeal dismissed the federal constitutional question in issue has been previously set forth herein under the preceding "Trial Court" subsection of the within section of this Petition.

California State Supreme Court — In petitioning the California State Supreme Court for a hearing the petitioner

abandoned all of the issues presented to the Court of Appeal except the federal constitutional question of the right of the petitioner under the Due Process requirement of the United States Constitution to "Notice" and an "Opportunity to be heard" prior to her being deprived of her life, liberty or property.

The raising of the said federal question was particularly set forth when Petitioner set out as "questions presented by this Petition" (at page 4 of the "Petition for Hearing" presented to the California Superior Court) the following:

> "Can a fundamental constitutional right, such as that to due process of law and the right to a hearing and notice thereof prior to being deprived of life, liberty or property be presumed to have been afforded a litigant because the record on appeal is silent as to any affirmative showing that the right was not accorded the litigant, particularly when it is the very opportunity to make such a record which is being alleged to have been denied by Appellant?"

and also when the following question was also presented (at page 4 of said Petition for Hearing):

> "Can there be a finding of notice when a party fails to appear, the only notice allegedly sent to the party was sent to the wrong address and this was known or should have been known to the Court at the time, and there is no other evidence affirmatively showing that the notice was not nevertheless received and considered?"

Thereafter, in briefing the said questions presented in the Petition for Hearing the petitioner raised the Constitutional right to notice and opportunity to be heard, applied the facts of the case to the requirement and in particular made reference to the holdings of the California State Court of Appeal decisions in *Valley Vista Land Co. v. Nipomo Water &*

Sewer Co. (1967) 63 Cal.Rptr. 78 and *Triumph Precision Products, Inc. v. Insurance Company of North America* (1979) 91 Cal.App.3d 362, 154 Cal.Rptr. 120, both of which cases stand for the proposition that "WHEN AN ENVELOPE CONTAINING NOTICE IS IMPROPERLY ADDRESSED, IT IS AS THOUGH NOTICE WAS NEVER MAILED BY THE COURT CLERK" (page 5, Petition for Hearing).

The California State Supreme Court did not discuss the issues which were raised by petitioner in her Petition for Hearing because said petition was denied without comment by "postcard" notification.

Thus, petitioner herein, as shown hereinabove, raised the federal question presented by this Petition for Writ of Certiorari (whether there could have been a determination that petitioner was afforded her constitutional right to notice and opportunity to be heard when there was no appearance at the hearing in question and the only evidence before the court of notice having been given was a "Clerk's Certificate of Mailing" which the court file showed was incorrectly addressed) at the first available opportunity and thereafter at each stage of the proceedings.

REASONS FOR GRANTING THE WRIT.

As the Petitioner has previously set forth herein, the California State Court of Appeal has correctly set forth in its opinion the fact that the Constitutional right to notice is "uncontested". Said court cited the case of *Wilson v. Sunshine Meat & Liquor Co., supra*, but a complete listing of other cases, either from California or this Court, upon which the Court of Appeal could have cited in support of this proposition is too lengthy to even begin to set out. Given this unquestioned premise however, one is still left with the question presented in this brief with respect to the question of whether or not the facts in this particular instance are such so as to allow the trial court to have properly made a determination that this Constitutional right was afforded this petitioner at the OSC hearing in which her entire complaint was dismissed.

Addressing initially the question of whether or not there is an independent state ground upon which the order of dismissal could have been based it is important to distinguish between the question of whether or not there were adequate grounds upon which to order a dismissal at the OSC hearing and the question of whether there were adequate grounds upon which to base a determination that petitioner had been given "notice" of the said OSC hearing. The former question was discussed in the opinion of the Court of Appeal because petitioner therein had additionally argued on appeal that she had likewise not attended the Mandatory Settlement Conference because notice of said conference had likewise been sent to the same incorrect address. Thus the question had been raised that even if the trial court was found to have been able to have proceeded with the said OSC hearing, the fact of no appearance at the Mandatory Settlement Conference should not, in and of itself, have been sufficient grounds upon which to have based a dismissal for lack of prose-

cution. Petitioner would submit that this is why the said Court of Appeal also felt compelled to set out a listing in its opinion as to the various affirmative acts which had been taken by the parties with regards to the prosecution of the action (pages 11, 12 and 13, Exhibit "B" in the appendix herein). Accordingly, petitioner would submit that even if one were to accept the fact that the Court of Appeal had adequate grounds, from the record before it, upon which to find a lack of prosecution and thus justify the dismissal without the need for the additional disputed fact as to whether the failure to attend the Mandatory Settlement Conference was sufficient alone to order the dismissal, this still does not constitute an independent state law grounds upon which to uphold the decision of said Court of Appeal and justify refusal to grant the within petition. The reason for this is the second question set forth above, which is also the question addressed in this Petition.

The point which is being raised in this Petition, and which was also raised at all stages below, does not require any examination of whether there were any possible independent grounds, or even adequate grounds, to have dismissed the complaint at the OSC hearing because the point raised herein addresses the question of whether or not there should have even been a hearing held in the first place, absent proper notice. And, petitioner would thus submit that since the right to notice is accorded a party by virtue of the United States Constitution, it would be a rare factual situation indeed in which one could find or even argue that there are or could be any independent state grounds upon which a denial of this right could rest.

It has always been, and it still remains, the contention of petitioner that had she been able to attend the OSC hearing she would have been able to present adequate evidence to avoid the dismissal of her complaint. But, the arguments in

this regard are not now before this Court and a recitation of or consideration of them would accordingly be improper. Again, the sole question presented herein concerns the fact of whether or not the said OSC hearing should have been held at all absent the ability to make a determination of notice having been given.

Because petitioner elected to proceed by way of direct appeal of the order of dismissal the record upon which the determination as to whether or not there was a sufficient factual basis upon which to find that notice had been given is the same for this Court now as it was for the trial court judge when he decided to proceed with the hearing. In examining this record it is proper to, as the Court of Appeal stated in their opinion at page 9 (Exhibit "B" in the appendix herein) "presume that the trial court considered all documents in the superior court file at the time of the hearing before stating that notice of the hearings had been given to plaintiff." Such an examination reveals the following with respect to the OSC hearing:

1. From the Los Angeles Superior Court's "Clerk's Transcript", all documents filed in this action prior to March 10, 1980, contained an address for counsel for petitioner of 11661 San Vicente Boulevard, Los Angeles, California.

2. On March 10, 1980, a "Notice of Change of Address" form was filed by counsel for petitioner setting forth an address for said counsel of 8383 Wilshire Boulevard, Beverly Hills, California. This document also included a "Proof of Service by Mail" which showed service of this "Notice of Change of Address" form by mail on counsel for respondent on February 28, 1980. (Clerk's Transcript, pp. 1278-1279)

3. The said "Clerk's Transcript" also shows that all documents which were filed by counsel for petitioner after

March 10, 1980, likewise included a reference to the 8383 Wilshire Boulevard address as being the location of the office for said counsel.

4. All documents in the said "Clerk's Transcript" which were served by the court clerk from commencement of the lawsuit until the time of trial were served on counsel for petitioner by mailing them to the outdated 11661 San Vicente Boulevard address.

5. The "Certificate of Readiness" was filed by counsel for respondent on April 9, 1980, and the address of counsel for petitioner was again brought to the court's attention as being 8383 Wilshire Boulevard. (Clerk's Transcript, p. 1281)

6. The OSC hearing, notice of which, or the lack thereof, is the question which is being addressed in this petition, is evidenced by the "Notice of Intention to Dismiss Action on Court's Own Motion" which was filed on April 29, 1981. In addition, attached thereto is the "Clerk's Certificate of Mailing", the principal "proof" of notice relied upon by respondent and the Courts below. And, certificate shows mailing to counsel for petitioner at the outdated 11661 San Vicente Boulevard address.[1]

---

[1]This document and its accompanying "proof" of service upon counsel for petitioner are clearly the most important documents contained in the entire record. At the time this matter first went up on appeal these documents should have been part of the "Clerk's Transcript" pursuant to the "Notice to Clerk to Prepare Reporter's Transcript and Clerk's Transcript" (Clerk's Transcript, p. 409). In addition, the documents were specifically requested by respondent on appeal in item 77 of their "Respondent's Designation of Clerk's Transcript" (Clerk's Transcript, pp. 413, *et seq.*). Nevertheless the court clerk failed to include them in the "Clerk's Transcript" which was sent to the Court of Appeals, for reasons known only to said court clerk. They can be found as Exhibit "B" in "Appellant's Reply Brief".

It should also be noted from these documents that even though the Court of Appeal treats the dismissal of petitioner's complaint to have been on the grounds of "lack of prosecution", said actual OSC document clearly indicates that although the petitioner is being ordered to show cause, if any, as to "why the Court should not on its own motion,

In addition to these particular documents on file with the trial court at the time of the said OSC re Dismissal, there were also a "Notice of Trial Setting Conference" including an attached "Certificate of Mailing" (Clerk's Transcript, page 1283); a "Trial Setting Conference Memorandum and Notice of Trial Pursuant to CCP 594", including an attached "Certificate of Mailing", (Clerk's Transcript, page 1284) and a document entitled "Representations re Trial Setting" (Clerk's Transcript, page 1285).

In considering these documents from the trial court record the Court of Appeal took the position (page 10, Exhibit "B" in the appendix herein) that by virtue of the fact that there were conflicting addresses for counsel for petitioner in the trial court record, this fact alone created a "conflict in the evidence" which "On appeal all conflicts in the evidence must be resolved in favor of the judgment" (page 10, Exhibit "B" in the appendix herein) and accordingly the trial court had the ability to have determined that proper notice had been given. In support of this proposition the

---

enter its Order dismissing the above entitled action for lack of prosecution," the grounds stated for the basis for this "lack of prosecution" claim is the fact that petitioner failed to appear at the Mandatory Settlement Conference as required by court policy. Clearly, had petitioner appeared at such conference no such OSC hearing would have been held or considered by the trial court. Thus, the reason for petitioner's repeated characterization in this petition of said OSC as having been for failure to attend said settlement conference as opposed to the more general "lack of prosecution" characterization.

More importantly, the fact that the dismissal was, in reality, clearly based only upon the failure of petitioner to attend the settlement conference, is borne out by reference to the transcript of the OSC re dismissal proceedings (pages 1 and 2 of the "Reporter's Transcript on Appeal") in which the only fact the trial court, at said hearing, deems to be relevant or worthy of mention is the fact of whether or not petitioner appeared at the settlement conference. This point is also supported by reference to the court's own "Minute Order" of these OSC proceedings (Exhibit "D-1" to "Appellant's Reply Brief" in the Court of Appeal) and the "Notice of Ruling" for the said OSC re dismissal, which was drafted, served and filed by counsel for respondent, (Clerk's Transcript, pages 1294 through 1296) neither of which makes any mention of said dismissal having been on the grounds of "lack of prosecution".

Court of Appeal cited the case of *Reeves v. City of Burbank* (1979) 94 Cal.App.3d 770. However, a reading of this case reveals that it was a situation in which there were no "findings of fact" for the court to consider on appeal and accordingly the Court of Appeal held that in such a situation they were compelled to view the evidence in the light most favorable to the prevailing party and accordingly, absent any such "findings" the court was compelled to find that if there was support for the contentions of respondent at the trial court level then these would take precedence over any contention of the appellant.

In the instant action, however, we do not have a situation in which the record from below simply presented a conflicting factual situation and accordingly the court was therefore free, under said *Reeves* case to "view the evidence in the light most favorable to the prevailing party" and accordingly determine that it was in that court's power to have properly found that "notice" had been given. The authority for this contention is in the cases cited in the briefs of petitioner below (Appellant's Reply Brief, page 5 at Court of Appeal level and Petition for Hearing, pages 5 *et seq.* at the State Supreme Court level).

In reviewing the record before the trial court at the time it made the determination that "Notice" had been given to petitioner, the only "proof" of such a "notice" was the "Clerk's Certificate of Mailing" with respect to the OSC re dismissal. (Appellant's Reply Brief, Exhibit "B" therein). The cases cited at each of the appeal stages below, as referred to above, *Valley Vista Land Co. v. Nipomo Water & Sewage Co.* (1967) 63 Cal.Rptr. 78 and *Triumph Precision Products, Inc. v. Insurance Company of North America* (1979) 91 Cal.App.3d 362, 154 Cal.Rptr. 120, however, clearly hold that WHEN AN ENVELOPE CONTAINING NOTICE IS IMPROPERLY ADDRESSED, IT IS AS

THOUGH NOTICE WAS NEVER MAILED BY THE COURT CLERK. Thus, under these cases, in viewing an alleged "proof of service by mailing" (which in this instance was entitled "Clerk's Certificate of Mailing") the said alleged "proof" must at least be "correctly addressed" if it is to in any way evidence "notice". Petitioner would submit that all of the evidence before the trial court at the time it reviewed its file to determine whether the address on this alleged proof of service by mail was correct or incorrect was such as to be susceptible of only one possible interpretation, "incorrect".

As cited to the courts below (Appellant's Reply Brief, page 5, at the Court of Appeal level and Petition for Hearing, pages 5 *et seq.* at the State Supreme Court level) Section 1013 of the *California Code of Civil Procedure*, states in pertinent part that for service of notice by mail the envelope must be "addressed to the person on whom it is served, at his office address as last given by him on any document which he had filed in the cause and served on the party making service by mail." And, the cases referred to above also make this requirement applicable to the court clerk when he is the one making such service of notice by mail. In this action the address which was last given, according to the records before the trial court at the time was the 8383 Wilshire Boulevard address which had been first brought to the court's attention by the "Notice of Change of Address" form which counsel for petitioner had filed with the court over a year earlier and which had thereafter been shown on all documents filed thereafter by said counsel for petitioner. (Clerk's Transcript, pages 1278-1279)

Thus, at the trial court level, the court, in examining the record/files before it at the time of the OSC re Dismissal hearing could properly only have examined the only evidence purporting to show the giving of "Notice" for the

said hearing (the said "Clerk's Certificate of Mailing") and thereafter, by then determining whether the address listed therein complied with said CCP 1013 and the *Triumph Precision Products, Inc.* and *Valley Vista Land Co.* cases it could only have arrived at the conclusion that the address listed therein was "incorrect". By refusing to examine the determination of the said trial court that notice was given, in light of these cases and said CCP 1013 and instead going into an examination of the facts before said trial court as only having created a "conflict in the evidence", the courts below effectively denied petitioner of her undisputed Constitutional right to notice and thus the need for this Court to now step in and grant petitioner said right.

The Court of Appeal at page 9 of their opinion which is attached hereto as Exhibit "B" in the appendix herein, considers the "facts" that "The file contains no evidence of return of these notices by the United States Postal Service for inability to deliver to addressee; nor does it contain any evidence that plaintiff's counsel did not receive them . . ." However, petitioner would submit that this is totally reverse logic and reasoning for the simple reason that it refuses to acknowledge the point that the file likewise didn't contain any proper evidence that notice had been properly been given in the first place. If the petitioner on appeal had been trying to argue that she didn't actually receive "notice" even though the "Clerk's Certificate of Mailing" had shown notice to a correct address then petitioner would admit that this reasoning and analysis by the Court of Appeal would have been appropriate. However, in this instance, the said certificate showed mailing to the wrong address and thus this fact alone should have been sufficient to evidence that it was "AS THOUGH NOTICE WERE NEVER MAILED BY THE CLERK".

In addition, this analysis by the said Court of Appeal also constitutes reverse logic when one considers the presumption of Section 641 of the California Evidence Code that a letter "is presumed to have been received in the ordinary course of mail" but only when it is "correctly addressed". Here, by making reference to the fact that the record did not contain any evidence "that plaintif's counsel did not receive" the alleged "Notice", said court is totally disregarding the "correctly addressed" condition of said *Evidence Code*, Section 641 presumption and is taking the position that just the fact that it was mailed to any address alone creates the presumption that it was received, absent evidence to the contrary. Petitioner would submit that such an interpretation should not be allowed to stand, particularly when, as here, it operates to deprive petitioner of her undisputed Constitutional right to notice.

The Court of Appeal states (at footnote 3, page 8, of their opinion, a copy of which is attached hereto as Exhibit "B" in the Appendix attached hereto) ". . . we will not here try the issue of fact whether he did or did not have notice of these hearings." And, for purposes of this Petition for Writ of Certiorari, the petitioner likewise is not asking that this Court now try the "issue of fact whether (petitioner or petitioner's counsel) did or did not have notice of these hearings." However, in considering this Petition it is important to make the distinction between the question of fact as to whether "notice" was actually received and the question of law as to whether or not the trial court, at the time of the OSC re Dismissal hearing, could have possibly determined, from the record before it at the time, that petitioner or her counsel had been mailed "notice" of the said OSC re Dismissal hearing, regardless of whether or not any such notice was actually received and the additional question of whether or not any such alleged mailing was done in such

a manner so as to comply with the petitioner's admitted Constitutional right to notice, again regardless of a determination as to whether or not any such notice so mailed was actually received.

In the instant action, the "Clerk's Certificate of Mailing" would have clearly constituted sufficient evidence of compliance with the requirement of "notice", regardless of whether or not it was actually received, had said certificate shown that it was mailed to the correct address for counsel of petitioner. However, in this instance said certificate plainly indicated that said "notice" was mailed to an incorrect address and that even when one is not required to examine the question of fact as to whether or not any such "notice" so incorrectly mailed was actually received, in the absence of petitioner and in the absence of any affirmative evidence which may have been submitted by respondent indicating actual receipt, petitioner herein would submit that as a matter of law, in the face of the incorrect address, the trial court did not have the ability to make any determination that "notice" had been given as admittedly Constitutionally required.

In considering, therefore, the "reasons as to why this Petition for Writ of Certiorari should be granted" it is vitally important that one first understand the fact that in this action we are not dealing with a situation in which this Court is being asked to make the factual determination as to whether or not petitioner herein ever actually received "notice" of the said OSC re Dismissal at which the trial court summarily dismissed her complaint for failure to attend the Mandatory Settlement Conference, but rather we are dealing with a situation in which petitioner herein is simply asking that this Court review the question of whether or not any trial court, in California, can base a determination that a party has been afforded their Constitutional right to "notice",

before being deprived of life, liberty or property, on an alleged "proof" of this "notice" which, on its face, shows said "notice" was sent to an incorrect address. The importance of this question becomes apparent when once considers the fact that if the rulings of the California courts in this case are allowed to stand, by this Court refusing to grant this Petition for Writ of Certiorari then henceforth, whenever a California trial court is faced with a situation in which they are holding a hearing which will clearly deprive a party of his life, liberty and property, and they are therein reviewing the record and files of the action to see whether or not the said party has been given "notice" of the hearing, all they are now required to do is determine whether or not the court clerk has mailed a "notice" of the hearing to petitioner or counsel for petitioner at any address. It will make no difference whatsoever, whether or not any such purported "notice" is mailed to a proper address for petitioner or her counsel because the only thing which is thus hereafter relevant is whether or not there is a "Clerk's Certificate of Mailing" on file. The question of whether or not the "mailing" was to a correct address for said petitioner or her counsel would be irrelevant since, under the holdings of the courts below in this action, the fact that the address shown on any such certificate of mailing was not the same as the one which had been previously set forth on all documents previously filed in the action would only create a "conflict in the evidence" and on appeal, accordingly, any such purported "mailing" would be sufficient to allow the said trial court to determine that proper "notice" had been given, absent additional evidence to the contrary being presented at the time of the hearing. Thus, unless this Court reviews the prior actions in this case, whenever a California trial court wants to hold a hearing and dismiss the complaint of a plaintiff in any pending action all it has to find is a

"Clerk's Certificate of Mailing" which indicates that a notice of any such hearing has been mailed out by the clerk and regardless of whether or not the address set forth in the said "Clerk's Certificate of Mailing" is the correct address of the other party, the mere fact that said certificate is on file will be sufficient to enable any such trial court to determine that "notice" had been properly given as required by the Constitution of the United States and that the only way in which a party can thereafter object to any such proceedings is to have attended any such hearing anyway and therein to have objected to "notice" by therein presenting affirmative proof that any such purported notice had not been received. Petitioner herein would respectfully submit this is clearly not the law of this land and that she should not have thus been so deprived of her uncontested Constitutional right to "notice" before, as herein, being deprived of her life, liberty or property.

It thus becomes clear as to why it is important that this Court exercise its discretion and grant a hearing on this Petition for Writ of Certiorari. If the Constitutional right of a person to "notice" prior to being deprived of life, liberty or property is to mean anything at all, the least a State can do in insuring that this right has been granted is to require that its courts make an inquiry into the fact, at the trial level, as to whether such right has been afforded. And, in exercising this requirement, any such State should at least require that, even if they are not going to factually review whether any such notice was actually received, they should at least inquire as to whether there was sufficient evidence before the trial court, at the time of the hearing, to have determined that such right had been granted consistent with prior decisions on the same point.

The main reason why that the instant action is important and the main reason this Court should step in and correct

things is that the courts of California, from the trial court level all the way up through the Supreme Court of California level, have all failed and refused to acknowledge the clear holding in the cases of *Valley Vista Land Co. v. Nipomo Water & Sewage Co.* (1967) 255 Cal.App.2d 172, 63 Cal.Rptr. 78 and *Triumph Precision Products, Inc. v. Insurance Company of North America* (1979) 91 Cal.App.3d 362, 154 Cal.Rptr. 120. Both of these cases clearly set forth the proposition and holding that "WHERE THE ENVELOPE CONTAINING THE NOTICE IS IMPROPERLY ADDRESSED, IT IS AS THOUGH NOTICE WERE NEVER MAILED BY THE CLERK." Again, here there is no question but that the said "ENVELOPE CONTAINING THE NOTICE" was improperly addressed. If a "Notice of Change of Address" and therafter inclusions on all documents filed by petitioner of an address in conformity with this "changed address" are to stand for anything at all they must stand for the fact that the address contained therein is the only "proper" address for the giving of notice. From what other source could any such "proper" address be derived, particularly where there is no other evidence presented to the court at the hearing, as here?

This Court has always been cognizant of the fact that unless there is jurisdiction a state cannot act so as to deprive a person of his life, liberty or property. This basis requirement has been a part of our laws since *Pennoyer v. Neff* (1878) 95 U.S. 714, 24 L.Ed. 565, requiring personal service within a states border prior to the state rendering a personal judgment. Where a court does not have jurisdiction to act a court cannot act and any attempt thereto is void.

In the instant action, unless there was proper "Notice" given the trial court was without jurisdiction to act and any attempt thereto was null and void. In order to satisfy the requirements of due process, notice must be real and rea-

sonable. (*In re Lambert* (1901) 134 Cal. 626, 66 P. 851; *Hampton Estate* (1942) 55 Cal.App.2d 543, 131 P.2d 565) Notice must be reasonably calculated, under all of the circumstances, to apprise interested parties of dependency of the action and afford them an opportunity to present their objections. (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652) Due process does not prescribe any particular form of notice. (*Drummey v. State Board of Funeral Directors & Embalmers* (1939) 13 Cal.2d 75, 87 P.2d 848) The legislature, in prescribing notice, is limited only by the implied constitutional mandate that notice must be such as would, according to common experience, be reasonably adequate for the purpose. (*Litchfield v. Marin County* (1955) 130 Cal.App.2d 806, 280 P.2d 117).

In situations such as that before this Court herein, the California legislature recognized the said Constitutional requirements are set forth above in setting up a system by which parties should be afforded notice prior to a court issuing orders at an Order to Show Cause hearing. Towards this end they enacted *California Code of Civil Procedure, Section 1013* by which they allowed service of the notice of such Order to Show Cause hearings by mail. However, in so doing they also included the proviso that such mailing be "addressed to the person on whom it is served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail." As the Court in *Valley Vista Land Co., supra*, and as also adopted in *Triumph Precision Products, Inc., supra*, in quoting from *Forslund v. Forslund* (1964) 255 Cal.App.2d 476, 37 Cal.Rptr. 489, "a successful service by mail requires strict compliance with the statute." In the instant action there is no question but that said statute, CCP 1013, was not complied with. The attempted service

by mail was not to the address as last given by petitioner but rather was to an incorrect address. Thus, in this action, the only evidence before the trial court at the time it decided to dismiss the complaint of petitioner was a "Clerk's Certificate of Mailing" and this alleged proof of service was fatally defective because it was to an incorrect address. The Court of Appeal completely neglected the fact that the only "correct" address under CCP 1013 was that "*as last given* . . . on any document filed in the cause and served on the party making service by mail" and that strict compliance with this requirement was mandatory. The Court of Appeal neglected to follow the holding of the said *Valley Vista Land Co., supra*, case and the *Triumph Precision Products, Inc., supra*, case, that "WHERE THE ENVELOPE CONTAINING THE NOTICE IS IMPROPERLY ADDRESSED, IT IS AS THOUGH NOTICE WERE NEVER GIVEN."

Conclusion.

This Petition for Writ of Certiorari presents an important issue to this Court because it sets out a factual situation in which the petitioner has been denied her basic Constitutional right to Due Process of Law prior to her being deprived of her life, liberty or property. All of the California state courts which have examined this action have held that the said Constitutional right to due process was afforded the petitioner on the grounds that there was an attempted service to petitioner by mail which was evidenced at the trial court level by a "Clerk's Certificate of Mailing", and that regardless of whether or not petitioner actually received this "Notice" by virtue of this alleged mailing, she was still afforded her Constitutionally guaranteed "Notice".

If the decision of the Court of Appeal is allowed to stand in this matter then this Court will, in effect, be giving the California Courts the "green light" to disregard the lan-

guage of their own clear statutes, *i.e.* CCP 1013, to disregard the clear holdings of their own case laws, *i.e. Valley Vista Land Co., supra*, and *Triumph Precision Products, Inc., supra*, and whenever a party fails to appear at a hearing at which the Court can dismiss their entire action, the only inquiry the court needs to make in order to determine whether or not it has jurisdiction to proceed in the matter is whether a purported "Proof of Service By Mail" has been filed, regardless of where the alleged mailing was sent.

Petitioner prays that a hearing be granted and that the Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division One.

Respectfully submitted,

NEWELL JOHN GARDNER,

Attorney for Petitioner.

APPENDIX.

Exhibit A.

Judgment.

Superior Court of the State of California for the County of Los Angeles.

Marguerite M. Shaw, Plaintiff, vs. Robert D. Mitchell, et al., Defendants.

Robert D. Mitchell, et al., Cross-complainants, vs. Marguerite M. Shaw, et al., Cross-defendants.

NO. C 179 576.

Filed: July 31, 1981.

In accordance with the Notice of Intended Decision entered herein on June 24, 1981, and the Findings of Fact and Conclusions of Law entered concurrently herewith, Judgment is hereby entered in favor of cross-complainant Robert D. Mitchell and against cross-defendant Marguerite M. Shaw for the principal sum of $38,696.63, together with prejudgment interest thereon from January 6, 1977 to the date of judgment here in the sum of $14,066, reasonable attorneys' fees in the sum of $3,395.00, and costs in the sum of $1,249.47, for a total judgment of $_____ .

DATED: JUL 31, 1981.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
JUDGE OF THE SUPERIOR COURT.

Minute Order.

In Department One of the Superior Court of California, County of Los Angeles.

Date MAY 14, 1981

HONORABLE HARRY V. PEETRIS, Judge. M. MATHEWS, Deputy Clerk. J. ALLENDER, Deputy Sheriff. [illegible], Reporter.

MOTION, 10:30 AM

317 C 179576

Marguerite M. Shaw, Counsel for Plaintiff.

Robert D. Mitchell, et al., Counsel for Defendant.

R. Heyman.

NATURE OF PROCEEDINGS: COURT'S OWN MOTION TO DISMISS

Trial date 5-18-81 to stand.

Courts Motion Granted.

Complaint ordered dismissal. Counsel for defendant to prepare an order of dismissal for the Court's signature.

Defendant to give notice

Minutes Entered 5/14/81 County Clerk.

Exhibit "D-1."

Notice of Ruling.

Superior Court of the State of California for the County of Los Angeles.

Marguerite M. Shaw, Plaintiff, vs. Robert D. Mitchell, et al., Defendants.

Avatar Design, etc., Cross-Complainant, vs. Marguerite M. Shaw, et al., Cross-Defendants.

Robert D. Mitchell and Ronald Lederman, Cross-Complainants, vs. Marguerite M. Shaw; K. J. Shaw Company, Inc., a California corporation; Takeuchi-Shoji Co., Ltd., a foreign corporation; and DOES 1 through 25, inclusive, Cross-Defendants.

Case No. C 179576.

Filed: May 20, 1981.

TO MARGUERITE M. SHAW AND HER ATTORNEY OF RECORD HEREIN, NEWELL JOHN GARDNER:

PLEASE TAKE NOTICE that on May 14, 1981, the Court heard and considered the Order to Show Cause set and noticed by the Court's own motion on April 29, 1981 and ordered that the complaint be and hereby is dismissed. The date for trial of the cross-complainants was ordered to proceed as scheduled on May 18, 1981.

DATED: May 18, 1981.

VALENSI AND ROSE, PLC
By /s/ Roger P. Heyman
Roger P. Heyman
Attorneys for Defendants
and Cross-Complainants

Exhibit B.

Opinion.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Marguerite M. Shaw, Plaintiff, Cross-Defendant and Appellant, v. Robert D. Mitchell, et al., Defendants, Cross-Complainants and Respondents. 2 Civil No. 67224. (Super.Ct. No. C-179576).

Filed: November 18, 1983.

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard A. Gadbois, Judge. Affirmed.

Newell John Gardner for Plaintiff, Cross-Defendant and Appellant.

Valensi and Rose and Roger P. Heyman for Defendant Cross-Complainant and Respondent Robert D. Mitchell.

Plaintiff and cross-defendant appeals from a dismissal of her complaint for lack of prosecution and from a judgment in favor of defendant and cross-complainant Mitchell for contribution from a co-signor of a guaranty.

Plaintiff and defendant entered into a joint venture which later took the form of a corporation (dba Avatar Design). They were two of five individual guarantors of a loan made by Bank of America to the corporation. Defendant supported his guaranty with pledged stock. The bank made demand for payment on the corporation which was unable to pay. Demand was then made on defendant pursuant to his guaranty, and his stock was sold to satisfy the indebtedness.

Only a few months after she executed the guaranty, plaintiff grew dissatisfied with the operation of the corporation, and on November 5, 1976, filed a complaint against defendant and others for fraud, conversion and breach of con-

tract. On June 16, 1977, defendant filed a cross-complaint alleging various causes of action, including one for contribution and reimbursement by a surety based on his payment of the corporate obligation.

A mandatory settlement conference was held on April 29, 1981; plaintiff failed to appear and, on a subsequent order to show cause hearing, the trial court dismissed the complaint on his own motion for lack of prosecution. On the day set for trial defendant proceeded on the the tenth cause of action of his cross-complaint for contribution reimbursement by surety and co-guarantor; plaintiff appeared. After a two-day trial, the court entered judgment on the cross-complaint in favor of the defendant and cross-complainant and against plaintiff and cross-defendant and for her aliquot share of the principal sum paid, plus interest and attorney's fees.

I

DISMISSAL OF THE COMPLAINT

The notice of appeal states that the plaintiff appeals "from the judgment entered in this action against plaintiff, MARGUERITE M. SHAW and in favor of defendant, ROBERT D. MITCHELL on the cross-complaint, and appeal [*sic*] dismissal of plaintiff's complaint, said judgment entered on July 31, 1981 . . . ." The judgment as entered refers only to the cross-complaint; no reference is made to the dismissal of the complaint. The only order of the court regarding that dismissal is in the minute order on the order to show cause hearing on May 14, 1981, which reads: "Complaint ordered dismissed — counsel for defendant to prepare an order of dismissal for the court's signature." No such order appears to have been prepared, signed or filed. Thus, as to the dismissal of her complaint, plaintiff is actually appealing from a minute order. Code of Civil Procedure, section 581d,

as amended in 1963, requires that "All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action . . . and such orders when so filed shall constitute judgments and be effective for all purposes . . . ." This statute provides the basis for holdings that a minute order granting a motion to dismiss is nonappealable. (*Adohr Milk Farms, Inc. v. Love* (1967) 255 Cal.App.2d 366, 369; *Rios v. Torvald Klaveness* (1969) 2 Cal.App.3d 1077, 1079.)

However, instead of dismissing the appeal from the dismissal we deem it just and proper to follow the procedure adopted in *Gombos v. Ashe* (1958) 158 Cal.App.2d 517, 524,[1] and amend the incomplete judgment to reflect the dismissal of the complaint. The trial court's failure to include the dismissal of the complaint in the judgment in the case before us clearly appears to be an oversight; the minute order unambiguously dismisses the complaint; and the issues related to appeal from the dismissal have been briefed by

---

[1]In *Gombos* this court was faced with an appeal from an incomplete judgment. Noting that the issues were already briefed and ready for decision, we chose to avoid the unnecessary delay and circuity that would result from dismissing the appeal and instructing the trial court to amend the judgment. Instead, "in the interests of justice," we amended the judgment directly to include the omitted dismissal of the third cause of action, thus preserving the appeal for consideration on the merits. This procedure has since been followed by the California Supreme Court in *Shepardson v. McLellan* (1963) 59 Cal.2d 83, 89 (judgment amended to include dismissal of cause of action based on order sustaining a demurrer); *Tenhet v. Boswell* (1976) 18 Cal.3d 150, 155 (judgment amended by ruling in favor of defendant on cause of action for declaratory relief where trial court mistakenly made no express ruling on that cause of action but clearly indicated that it considered plaintiff's position insupportable); *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 289, footnote 1 (judgment amended to include dismissal based on motion for judgment on pleadings which was orally granted at outset of trial but inadvertently omitted from judgment) and *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 921 (judgment amended to include dismissal of second cause of action where court's failure to do so was clearly an oversight.

the parties and are ready for decision.

Appellant contends that it was an abuse of discretion for the trial court to dismiss her complaint for lack of prosecution. The circumstances of this case compel our affirmance of the order of dismissal. The power of the court to dismiss an action for want of diligent prosecution is well settled. (*Witter v. Phelps* (1912) 163 Cal. 655, 656; *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn.* (1977) 71 Cal.App.3d 706, 712.) The setting for the court's exercise of that power in the present case was created by the Los Angeles Superior Court Civil Trials Manual, section 11, page 9, which requires the litigants in a case to attend the mandatory settlement conference. "If there is a violation of this section by a plaintiff or cross-complainant, the cause may be ordered set in the appropriate master trial calendar department for an order to show cause hearing re sanctions including vacating the trial date and dismissal." (L.A. Super. Ct. Civil Trials Manual, § 10, pp. 8-9.) Plaintiff failed to attend the conference, and the court on its own motion set a hearing to show cause why an order dismissing the action for lack of prosecution should not be entered. Plaintiff also failed to attend the order to show cause hearing, and the court rendered its decision: "The plaintiff having failed to appear on a noticed motion being advised that the court would consider dismissing the complaint because of lack of prosecution, the court will at this time dismiss the complaint and order it stricken."

The question of diligent prosecution is one largely committed to the discretion of the trial court. (*Raggio v. Southern Pacific Co.* (1919) 181 Cal. 472, 475.) "It is . . . the rule that the action of the trial court in dismissing an action for failure to prosecute diligently should not be disturbed except upon a showing of a clear abuse of discretion and it is incumbent upon the appellant to show that there has been

such an abuse." (*Netzley v. Hillstrom* (1954) 122 Cal.App.2d 417, 420.) Appellant attempts to show an abuse of discretion by claiming here that her counsel did not receive notice of the mandatory settlement conference or the order to show cause hearing as the notices were incorrectly addressed by the clerk.[2] No such excuses or claims were before the trial court at the time of the hearing.[3] Plaintiff had a procedural choice — an order of dismissal for want of prosecution is directly appealable or an ejected plaintiff may seek redress through a motion to vacate pursuant to section 473 of the Code of Civil Procedure where, through mistake, inadvertance or excusable neglect, he has failed to make the showing he could have made at the hearing on the motion. (*City of Los Angeles v. Gleneagle Dev. Co.* (1976) 62 Cal.App.3d 543, 553.) The court in *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 388-389, describes the advantages of the latter approach: "Newly revealed facts, or the hitherto unrevealed impact of known facts, may demonstrate that the moving party was effectually deprived of a meaningful opportunity to defend against the original motion. These newly revealed circumstances may also persuade the trial court that the dismissal should not have been ordered . . . and the action of the appellate court will be based upon a record not available to the plaintiff had he appealed from

---

[2]The requirement of notice is unquestioned. (See *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 565, fn. 7.)

[3]Appellant submits as an exhibit to her reply brief a six-page declaration of her counsel which was never before the trial court and is not properly part of the record before us. At no time did plaintiff's counsel present to the trial court any excuse for her failure to appear, and we will not here try the issue of fact whether he did or did not have notice of these hearings. Nor will we consider matters not contained in the record. (*In re Hochberg* (1970) 2 Cal.3d 870, 875.) Appellant also lists six documents which were part of the superior court file but not part of the clerk's transcript on appeal. We will treat the record on appeal as augmented by these documents. (Rule 12(a), Cal. Rules of Court; *Powers v. Sissoev* (1974) 39 Cal.App.3d 865, 867, fn.1.)

the dismissal itself." Plaintiff chose to appeal directly from the dismissal rather than move to vacate under Code of Civil Procedure, section 473, and by that choice has limited herself to the record she has made with the trial court.

In examining appellant's contention that her counsel did not receive notice, we may properly presume that the trial court considered all documents in the superior court file at the hearing before stating that notice of the hearings had been given to plaintiff. That file contained the notice of trial setting conference, the trial setting memorandum stating the date of the trial and of the mandatory settlement conference, and the notice of intention to dismiss action on court's own motion; each of these documents included a certificate of mailing, signed by the clerk of the court, showing notice to plaintiff's counsel. The file contains no evidence of return of these notices by the United States Postal Service for inability to deliver to addressee; nor does it contain any evidence that plaintiff's counsel did not receive them. In addition, before the trial court was a minute order dated January 8, 1981, showing a trial setting conference at which mandatory settlement conference was set for April 29, 1981, and trial for May 18, 1981, and reciting that counsel, including plaintiff's attorney appeared on that date. In oral appellate argument counsel denied he was present.[4] However, nothing in the file appearing to the contrary, the trial court had a right to rely on the recital in the minute order

---

[4]Strictly outside of the record, plaintiff's counsel represented on oral argument before this court, that he did appear at the trial setting conference (notice for which he obviously received), completed the form which is in the file, and left to attend to other matters expecting to be notified of the dates set for the mandatory settlement conference and the trial. He also claimed he received no notice of either. But this did not relieve counsel of the obligation to follow up with inquiry concerning such dates when, as he claims, he did not receive the expected notice from the court. He made no effort to determine the dates that he must have known were set after filing the trial setting form.

thus, it could and obviously did believe plaintiff's counsel was present and had personal notice of those dates. The only evidence which supports appellant's claim of notice is the change of address form filed by her counsel on March 10, 1980. On appeal all conflicts in the evidence must be resolved in favor of the judgment. (*Reeves v. City of Burbank* (1979) 94 Cal.App.3d 770, 776.) The record shows no abuse of discretion in the trial court's determination that plaintiff had notice of the mandatory settlement conference and of the order to show cause hearing.

The discretion of the lower court regarding diligent prosecution is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled by fixed legal principles, in conformity with the spirit of the law. (*Raggio v. Southern Pacific Co., supra*, 181 Cal. 472, 475.) It is an accepted principle that it is the plaintiff's duty at every stage of the proceedings to use diligence to expedite his case to a final determination. (*Feingersh v. Lutheran Hosp. Society* (1977) 66 Cal.App.3d 406, 411; *Lowe v. Thomas* (1970) 11 Cal.App.3d 867, 870.)

The superior court file which was before the trial court, which matters are reflected in the record before us, amply supports the court's decision. The chronology of events includes the following:

Nov. 5, 1976	Complaint filed
Dec. 16, 1976	Defendant's interrogatories
Jan. 10, 1977 April 14, 1977 May 24, 1977 Aug. 4, 1977	Defendant's motions to compel plaintiff to comply with discovery
Feb. 8, 1977	Plaintiff's deposition of defendants (continued to Apr. 1977, then Aug. 1977)

June 28, 1977	At-Issue Memorandum filed by defendant
Aug. 4, 1977	Plaintiff's motion to strike At-Issue Memorandum
Nov. 17, 1977	Plaintiff's deposition of other defendant
Dec. 5, 1977	Plaintiff's request for documents from corporation
Dec. 23, 1977	Plaintiff's motion for production of documents
Jan. 24, 1978	Plaintiff's supplemental affidavit in support of motion for production of documents
Nov. 28, 1978	Defendant's request for documents from plaintiff
Dec. 15, 1978	Plaintiff's counsel's motion to withdraw as attorney for plaintiff and as to other party (counsel had motion as to plaintiff taken off calendar)
April 9, 1980	Certificate of Readiness filed by defendant
Jan. 8, 1981	Trial setting conference — showing attendance by plaintiff's counsel
April 29, 1981	Mandatory settlement conference
May 14, 1981	Order to show cause hearing re dismissal

Our review of the record which was before the trial court shows plaintiff's last affirmative acts in prosecuting the case were her discovery requests and motion for production of documents which took place between February 8, 1977, and January 24, 1978. Plaintiff never filed an At-Issue Memorandum with the court and in fact moved to strike the At-Issue Memorandum filed by defendant in August 1977. Nor

did plaintiff ever file a Certificate of Readiness with the court; that, too was filed by defendant. Inactivity in prosecution by plaintiff extended from January 24, 1978, until the date of the order to show cause hearing, May 14, 1981, a period of three years, three months. The trial court had before it no excuse for plaintiff's lack of prosecution during that period. There is manifest no abuse of discretion in the court's dismissal of the complaint.

II

MOTION FOR CONTINUANCE

Appellant's second contention is that the trial court abused its discretion in denying her counsel's motion for continuance on the trial on the cross-complaint. The grant or refusal of a continuance is a matter of discretion with the trial court and its ruling ordinarily will not be disturbed. (*Schlothan v. Rusalem* (1953) 41 Cal.2d 414, 417.) The basis for a continuance is set out in rule 224 of the California Rules of Court: "No continuance before or during trial in civil cases shall be granted except upon an affirmative showing of good cause therefore." The trial court's determination of "good cause" is guided by the Standards of Judicial Administration for the superior court, adopted by the Judicial Council. Section 9, adopted in 1971, states in pertinent part: "To insure the prompt disposition of civil cases, each superior court should: . . . (b) Adopt a firm policy regarding continuances, emphasizing that the dates assigned for a trial setting or pretrial conference, a settlement conference and for trial must be regarded by counsel as definite court appointments. . . . In ruling on a motion for a continuance, the court should consider all matters relevant to a proper determination of the motion, including the court's file in the case and any supporting declarations concerning motion; . . . the nature of any previous continuances, ex-

tensions of time or other delay attributable to any party; the proximity of the trial or hearing date; whether the continuance may properly be avoided . . . by the trailing of the matter for trial or hearing; . . . and any other fact or circumstance relevant to a fair determination of the motion."

Plaintiff's motion for a continuance was made orally in the master calendar department on the date set for trial, and we have only her opening brief (which are not part of the record before us) as to the affirmative showing of good cause set forth by her counsel at that time. She asserts in her opening brief: "Said motion was made on the grounds that counsel had not been given notice of the trial, was going to be engaged in a criminal matter for this same period of time, and it would be extremely prejudicial to his case to be required to proceed at this time." At this point we note that the record before us reflects a consistent pattern of delay and inaction by plaintiff's counsel, which was relevant to a proper determination of the motion by the trial court. Although the court denied the motion for a continuance made on the day set for trial, the minute order for that date shows that the court, on its own motion, "trailed" the case from May 18, 1981 until May 26, 1981, thereby guaranteeing plaintiff's counsel eight days to prepare for trial and to conclude the criminal matter in which he was engaged. On May 26, 1981, the case returned to the master calendar department, and continued to trial until the trial finally began on June 4, 1981. Plaintiff was not "thrown into trial," as her counsel later proclaimed to the court; the court assured plaintiff's counsel of eight days to prepare for trial, and in fact provided sixteen days before trial actually began. The avoidance of a continuance by the trailing of the matter is a method specifically authorized by section 9(b) of the Standards of Judicial Administration, and has also been approved by the Supreme Court in *Schlothan v.*

Rusalem, supra, 41 Cal.2d 414, 417: "[W]hile such orders may have the effect of causing inconvenience at times to certain counsel and litigants, they are not to be condemned when reasonably used in the interest of the expedition of the administration of justice."[5] We perceive no abuse of discretion in the court's denial of plaintiff's motion for continuance under these circumstances.

III

FINDINGS OF FACT

Appellant challenges all 14 findings of fact as unsupported by the evidence. Findings of fact may be disturbed on appeal only if no substantial evidence supports them. (*Peery v. Superior Court* (1981) 29 Cal.3d 837, 845.) In reviewing the sufficiency of the evidence to support the trial court's findings, this court must accept as true all evidence and all reasonable inferences from that evidence tending to establish the correctness of the findings as made. Every conflict is to be resolved in favor of the findings. All issues of credibility are within the province of the trier of fact. (*Saraceno v. Foothill-DeAnza Community College Dist.* (1982) 127 Cal.App.3d 850, 858.) We have carefully read and considered each of the 14 findings in relation to each challenge made, and find her contentions to be without merit.

The trial court heard testimony from defendant and from the loan officer at the bank which fully established defendant's prima facie case for contribution from a surety. We limit our discussion of the sufficiency of the evidence to those challenged findings which might have afforded plain-

---

[5]It should be noted that "trailing" in the Los Angeles Superior Court presents no great inconvenience to counsel as the court uses electronic paging devices which permit counsel to proceed with normal office or court work until such time as the court "beeps" them for trial.

tiff a defense to the cross-complaint. Plaintiff claimed that the corporation was capable of paying the debt to the bank and that defendant was a volunteer at the time he paid the obligation and therefore is not entitled to contribution from his co-sureties. The court's Finding No. 8 was that the corporation was insolvent at the time the obligation matured and was unable to pay and did not pay that obligation. Defendant testified that the corporation never made a penny, that it lost money every year, and that it was unable to meet its obligation to the bank. He further testified that he did not volunteer payment but was forced by the bank to liquidate the stock pledged as collateral. The loan officer at the bank corroborated his testimony.

As part of her defense of fraud, plaintiff attempted to show that Avatar Design was not actually a corporation as stock had never been issued and other corporate formalities had not been performed. Defendant testified that Avatar Design was a corporation, and he introduced into evidence a certified copy of the Articles of Incorporation. According to Corporations Code, section 200, subdivision (c), the corporate existence begins upon the filing of the articles and continues perpetually, unless otherwise expressly provided by law or in the articles. The court had sufficient evidence to support its findings that Avatar Design was a corporation.

Appellant contends that the trial court erred in finding that her guaranty was not procured by fraud or misrepresentation, since she never received stock certificates for the 40 percent share of the corporation which was the consideration for her guaranty.[6] The court heard defendant testify

---

[6]Appellant complains she could not adequately defend against the cross-complaint because her complaint was dismissed which prevented her from showing fraud on the part of the cross-complainant. We note that at the trial appellant did not challenge the dismissal of the complaint. She did mention it once, and then it was on the second day of trial and given as an excuse for asking defendant to produce certain corporate

(footnote continued on following page)

that plaintiff was a 40 percent shareholder in the corporation, and that such stock ownership was the consideration for her execution of the guaranty. Appellant herself concedes in her opening brief the evidence as presented was short of affirmatively establishing fraud on the part of the defendant, and we agree. Appellant's contentions require her to demonstrate that there is not substantial evidence to support the court's findings (*Associated Creditor's Agency v. Davis* (1975) 13 Cal.3d 374) and she has not done so.

IV

PREJUDICE OR BIAS

Appellant's final contention is that there was misconduct of the court evidencing prejudgment, prejudice and bias. She claims the strongest instance of misconduct was that she was forced to go to trial without proper notice. We will not belabor a point already disposed of, except to note that plaintiff did not raise this lack of notice in her opening argument, nor did she raise it in her closing argument. It was mentioned only once, during the second day of trial, as an excuse by her counsel for asking that defendant produce certain corporate records and financial statements. The instances appellant points up do not demonstrate prejudice or bias; on the contrary, we find the record filled with instances where the court accommodates and indulges plaintiff's counsel, even over the well-based objections of defendant. Plaintiff's contention is wholly without merit.

The judgment is affirmed.

LILLIE, J.

---

records. But appellant raised no affirmative defense of fraud in her answers to the cross-complaint (in fact she raised therein no affirmative defense of any kind) but was given the opportunity to present evidence on the issue of fraud at the trial. Evidence was offered and the trial court found there was no fraud in obtaining her guaranty.

We concur:

SPENCER, P.J.

HANSON (Thaxton), J.

Exhibit C.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 91402.

FEB 15, 1984.

I have this day filed Order HEARING DENIED. *In re:* 2 Civ. *No.* 67224 MARGUERITE M. SHAW *vs.* ROBERT D. MITCHELL.

Respectfully,

Clerk

Exhibit D.

Full text of the particular "Constitutional and Statutory Provisions Involved" in this matter:

1. *United States Constitution — Amendment V:*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. *United States Constitution — Amendment XIV, Section 1.:*

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. *California Evidence Code, Section 641* (Stats. 1965, c.299)

"Letter received in ordinary course of mail. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."

4. *California Code of Civil Procedure, Section 1013,* (Amended by Stats. 1980, c.196):

"1013. Service by mail; procedure; completion; extension of time for exercising right or performing act.

(a) In case of service by mail, the notice or other paper must be deposited in a post office, mailbox, sub-post office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope with postage prepaid, addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit, but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of such document served by mail shall be extended five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States, but such extension, shall not apply to extend the time for filing notice of intention to move for new trial, notice of intention to move to vacate judgment pursuant to Section 663a of this code or notice of appeal.

(b) The copy of the notice or other paper served by mail pursuant to this chapter shall bear a notation of the date and place of mailing or be accompanied by an unsigned copy of the affidavit or certificate of mailing. The provisions of this subdivision are directory."